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December 23, 1998

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BY HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Direct Access to the INTELSAT System;.*
IB Docket No. 98-102 &
File No. 60-SAT-ISP-97

Dear Ms. Salas:

Yesterday, December 22, 1998, COMSAT Corporation filed "Comments of COMSAT COMSAT Corporation" in the above-captioned proceeding. A review of the filing has discovered a number of typographical errors that occurred inadvertently in the final editing process as the deadline neared.

Accordingly, we are respectfully submitting an original and six corrected copies of the "Comments of COMSAT Corporation" and ask that they be substituted *nunc pro tunc* for the copies filed yesterday. For convenience, the affidavit of Theodore W. Boll and a chart showing the direction of rates (filed separately yesterday), are attached to the corrected Comments being filed today.

There are no corrections to the separately bound "Executive Summary" and "Appendices" filed yesterday. The corrected Comments filed today should be associated with those materials.

We are delivering copies of the complete corrected Comments (together with the Executive Summary and Appendices) to the International Bureau and to International Transcription Services.

Best regards.

Respectfully submitted,

William B. Baker

Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Direct Access to the	)	IB Docket No. 98-102
INTELSAT System	)	File No. 60-SAT-ISP-97
	)	
	)	

To: The Commission

COMMENTS OF COMSAT CORPORATION

(Corrected Copy)

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December 22, 1998

TABLE OF CONTENTS

PAGE

I. BACKGROUND: THE CREATION OF COMSAT AS THE SOLE U.S. PARTICIPANT IN INTELSAT 4

A. Congress Decided that the United States Would Participate in the New Satellite System through a Private Entity 4

B. Shared Assumptions Led to Congress's Granting COMSAT its Exclusive Franchise over Access to the Proposed Satellite System 5

C. Congress Rejected Common Carrier Control of the U.S. Participant to Prevent Carrier Exploitation of the Necessary Exclusive Franchise on Access to the New Satellite System 7

D. Congress Created COMSAT as a Corporation Independent of the Incumbent Common Carriers and with Safeguards to Prevent Abuse of the U.S. Participant's Exclusive Franchise on Access to the Proposed Global System 9

1. Congress Obligated COMSAT to Own and Operate the Global Satellite System and Granted COMSAT the Exclusive Franchise to U.S. Access to the System 10

2. Congress Guarded against Common Carrier Control Over COMSAT 11

3. Congress Empowered the FCC To Ensure that COMSAT Faithfully Executes its Trust in a Nondiscriminatory and Pro-Competitive Manner 12

4. Congress Explicitly Allowed Competition Where Possible 13

II. THE PLAIN MEANING OF THE SATELLITE ACT PREVENTS THE COMMISSION FROM MANDATING LEVEL 3 DIRECT ACCESS TO THE INTELSAT SYSTEM 14

A. The Language, Structure, and Context of the Satellite Act Prohibit the Commission from Ordering Direct Access 15

1. The Satellite Act Grants Only COMSAT the Right to Furnish, for Hire, Channels of Communication with the Global Satellite System 16

2. Congress Expressly Permitted Competition in Connection with Other Aspects of the INTELSAT System but Did Not Provide for Competition in Access to the System 20

3. The Statutory Protections Against Common Carrier Dominance of COMSAT Are Meaningless if COMSAT Does Not Have the Exclusive Franchise over Access to INTELSAT 21

4. Direct Access to the INTELSAT System by Common Carriers Would Have Undermined Fulfillment of One of the Central Purposes of the Satellite Act 22

5. Direct Access Makes No Sense in the Context of a Satellite System Entirely Owned by COMSAT 23

B. The Statutory Background and History of the Satellite Act Confirm that Congress Granted COMSAT an Exclusive Franchise To Access the INTELSAT System 23

1. All Parties Involved in Consideration of the Satellite Act Recognized that COMSAT Was to Be Granted Exclusive Access 23

2. The Consistent References to the U.S. Participant as a "Monopoly" Make No Sense If Direct Access Were Contemplated 25

3. If Direct Access Were Contemplated, the Consistent References to COMSAT as the "Carriers' Carrier" Make No Sense 26

4. Congress's Rejection of the Carrier Consortium Alternative Demonstrates that Congress Intended to Grant COMSAT an Exclusive Franchise over Access to the New Satellite System 27

C. For Almost Forty Years, the Commission and the Courts Have Explicitly Recognized that COMSAT Has an Exclusive Franchise Over Access to the INTELSAT System 28

D. Congress's Passage of the Inmarsat Act in 1978 Confirms that Congress Granted an Exclusive Franchise to COMSAT in the Original Satellite Act 30

1. All Participants in the Debate Over the Inmarsat Act Acknowledged that the Satellite Act Had Granted COMSAT an Exclusive Franchise Over Access to INTELSAT 30

2. The Language of the Inmarsat Act — Patterned After the Satellite Act — Confirms that the Satellite Act Granted COMSAT the Exclusive Franchise Over Access to INTELSAT 32

III. MANDATING LEVEL 3 DIRECT ACCESS WOULD OBLIGATE THE U.S. GOVERNMENT TO COMPENSATE COMSAT FOR THE TAKING OF PROPERTY AND OR FOR BREACHING THEIR REGULATORY CONTRACT 34

A. Level 3 Direct Access Would Breach the Regulatory Contract 35

B. Level 3 Direct Access Would Constitute a Regulatory Taking, Obligating the U.S. Government to Pay Just Compensation 39

C. Level 3 Direct Access Would Constitute a Permanent Physical Occupation of COMSAT's Property and Thus A Per Se Taking, Obligating the U.S. Government to Pay Just Compensation 40

IV. THE ECONOMIC AND POLICY REASONS WHICH FORMED THE BASIS FOR THE COMMISSION'S PRIOR REJECTION OF DIRECT ACCESS AS CONTRARY TO THE PUBLIC INTEREST ARE MORE SUBSTANTIAL TODAY 42

A. The Facts Justifying the Commission's Rejection of Direct Access in 1984 Are Even More Compelling and Relevant in 1998 44

1. The Commission's Findings in 1984 Are Even More Soundly Based Today 45

2. None of the Events of the Past Fourteen Years Cited by the *Notice* Provides a Rational Basis for Reversing the Commission's Prior Conclusion 48

3. Other Developments, Including the Tremendous Growth in Competition in International Services Since 1984, Further Compels Rejection of Level 3 Direct Access 50

4. The Commission's Recent Findings and Current Marketplace Facts Demonstrate That No Need for Level 3 Direct Access Exists 53

B. The Harms That Would Be Spawned by Level 3 Direct Access Would Greatly Outweigh Any Benefits 61

1. The Public Interest Would Not Be Served by Allowing Direct Participation in the U.S. Marketplace by an Intergovernmental Organization That Pays No Taxes and Is Not Subject to FCC Jurisdiction 62

2. Because the Commission Misapprehends the Nature of INTELSAT Utilization Charges, Level 3 Direct Access Would Force COMSAT to Subsidize Service for the Large International Carriers at Below-Cost Rates 64

3. Implementation of Level 3 Direct Access Would Delay or Skew the Privatization of INTELSAT 69

4. Any Potential Benefit of Direct Access to End Users Would be *de Minimis* 73

5. Given the Pending Privatization of INTELSAT, Any Potential Benefits of Direct Access Would Be of Short Duration and Not Worth the Significant Costs 76

C. Direct Access in Other Countries Occurs in Factually Inapposite Settings and Therefore Is Not Relevant to the Competitive U.S. Marketplace 77

V. IF LEVEL 3 DIRECT ACCESS WERE IMPLEMENTED, A SUBSTANTIAL SURCHARGE WOULD BE NECESSARY TO ENSURE THAT COMSAT IS COMPENSATED AS REQUIRED BY LAW 82

VI. CONCLUSION 86

Before the
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Direct Access to the	)	IB Docket No. 98-102
INTELSAT System	)	File No. 60-SAT-ISP-97
	)	
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To: The Commission

COMMENTS OF COMSAT CORPORATION

COMSAT Corporation ("COMSAT") hereby submits comments and supporting materials in response to the Commission's *Notice of Proposed Rulemaking* ("*Notice*") in the above-referenced docket.[1] As set forth herein, the Commission lacks the statutory authority to implement its proposal for Level 3 direct access. Moreover, the proposal raises substantial constitutional issues under the Fifth Amendment. In addition, the *Notice* offers no factual basis to justify such a radical departure from the agency's own long-established determination that direct access would not serve the public interest. Finally, mandating direct access at this time

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[1] *Direct Access to the INTELSAT System*, IB Docket No. 98-192, File No. 60-SAT-ISP-97, FCC 98-280, ¶ 15 (rel. Oct. 28, 1998) (Notice of Proposed Rulemaking) ("*Notice*") (calling for comment on "implementing Level 3 contractual direct access"). The *Notice* envisions that U.S. customers would deal directly with INTELSAT to obtain capacity. *Id.* at ¶ 8. While these customers would place their orders with and make utilization payments directly to INTELSAT, COMSAT would remain liable for satisfying U.S. investment and other treaty obligations to the intergovernmental satellite organization.

would seriously jeopardize achievement of U.S. policy goals relating to privatization of the International Telecommunications Satellite Organization ("INTELSAT").

INTRODUCTION AND SUMMARY

Commission imposition of a direct access requirement would: (1) exceed the FCC's authority under the Communications Satellite Act of 1962, (2) constitute a "taking" of COMSAT's property without compensation and breach the regulatory contract between COMSAT and the United States, and (3) be arbitrary, capricious, and contrary to the public interest by harming competition and putting at risk the full privatization of INTELSAT. Specifically:

- The language, structure and context of the Satellite Act make it unmistakably clear that Congress intended to give COMSAT the exclusive franchise to provide INTELSAT services in the U.S.
- The statutory background and history explicitly confirm this Congressional determination.
- For almost four decades, the Commission and the Courts have consistently recognized that the Act establishes COMSAT as the sole U.S. participant in INTELSAT.
- Enactment of the Inmarsat Act of 1978 provided further Congressional recognition of COMSAT's exclusive franchise to the INTELSAT system.
- Moreover, a direct access mandate would expose the U.S. Government to an obligation to compensate COMSAT for the "taking" of its property without just compensation. Direct access would also violate the "regulatory contract" in which COMSAT agreed to invest and assume the burdens of building and operating an international satellite system, as well as serving as U.S. signatory, in exchange for the continuing opportunity to

earn a compensatory return as the exclusive provider of access to the INTELSAT system.

- In addition, imposition of a direct access requirement would be impossible to reconcile in any principled way with the reasons previously relied upon by the Commission for rejecting direct access—especially in light of current marketplace realities.

- Direct INTELSAT participation in the U.S. market would give INTELSAT an unfair competitive advantage. Unlike its rivals (or COMSAT), INTELSAT is exempt from U.S. income tax, D.C. income tax, and customs duties on imported equipment. In addition, its foreign employees are exempt from U.S. income taxation. (In the past, the alleged competitive advantage associated with COMSAT's limited Signatory immunity has been used by the FCC as basis for denying U.S. domestic market entry).

- The competitive advantages that INTELSAT would enjoy in the U.S. market with direct access would give INTELSAT every incentive to favor continuation of its intergovernmental status - - and to oppose further moves toward privatization that would eliminate the special advantages that status entails.

- Direct access would also give foreign Signatories, in their own right, a strong incentive to oppose further privatization. As things now stand, privatization of INTELSAT is a condition precedent to Signatories' own participation in the U.S. market as providers of INTELSAT capacity. But American adoption of a direct access regime would give them a vehicle for such participation, even without privatization.

- Direct access would balkanize the U.S. presence in INTELSAT and undermine COMSAT's continued ability to provide strong leadership to INTELSAT in the privatization process.

I. BACKGROUND: THE CREATION OF COMSAT AS THE SOLE U.S. PARTICIPANT IN INTELSAT

When Congress adopted the Satellite Act, in 1962,[2] it endowed COMSAT with a unique and historic public trust—to finance, own, operate, and provide nondiscriminatory access to the world's first global satellite communications system. This was an enormous undertaking that entailed a high degree of uncertainty and financial risk.[3] To effectuate this mission, COMSAT, as a for-profit corporation, was to be the sole agent of the people and government of the United States, with all the benefits and burdens that such a responsibility entails.[4]

A. Congress Decided that the United States Would Participate in the New Satellite System through a Private Entity

COMSAT's core attributes resulted from a considered year-long legislative deliberation that began with President Kennedy's July 1961 call for the United States to lead in the creation of an international satellite communications system.[5] The Administration in its proposal (and the Congress in its ultimate adoption of the Satellite Act) opted for U.S. participation to be through a private entity, rather than through a government-owned corporation, as some had

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2 *See* Communications Satellite Act of 1962, Pub. L. 87-624 (codified at 47 U.S.C. §§ 701-44) (hereinafter "the Act" or "the Satellite Act").

3 It must be remembered that, at the time, the very feasibility of building a global satellite communications system with unproven technology was unknown.

4 Appendix 1, The FCC Lacks the Statutory Authority to Permit Level 3 Direct Access to the INTELSAT System (Dec. 22, 1998). The entire contents of Appendix 1 are incorporated in these more summary comments by reference.

5 Statement by the President on Communication Satellite Policy, 1961 Pub. Papers 529.

proposed.[6] American participation through a private corporation was intended to (1) demonstrate to the world the benefits of a free-market system; (2) avoid the need for taxpayers to fund the enormous cost of the new satellite system; and (3) make available ready alternative sources of capital from private citizens willing to speculate and hopefully profit from the endeavor by investing in COMSAT.[7]

B. Shared Assumptions Led to Congress's Granting COMSAT its Exclusive Franchise over Access to the Proposed Satellite System

Having determined that the U.S. should participate through a private entity, all participants in the extensive and vigorous ensuing debate agreed on certain fundamental assumptions. First, U.S. participation should be through a single entity to facilitate negotiations and dealings with the other nations it was hoped would join in this enterprise.[8] Second, the U.S. participant would incur enormous costs in building this global satellite system.[9] Third, as demonstrated in detail below, the U.S. participant would have to be granted an exclusive franchise over U.S. access to that satellite system in order to have the incentive to make the required investment, and those accessing the satellite system through the U.S. participant would have to pay a fee for doing so.[10] Deputy Attorney General Katzenbach testified that under either a carrier consortium system or the COMSAT alternative "there

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6 *See generally* Appendix 1 at Section I.B.

7 *See generally* Appendix 1 at Sections I.A.5, I.A.6 and II.B.

8 *See* Appendix 1 at Section I.A.1, I.B.3.

9 *See* Appendix 1 at I.a.6.

10 *See generally infra* Section II.B.1; Appendix 1 at Section I.A3.

would be one corporation engaged in the transmission of messages by satellite, perform[ing] services for all authorized communications carriers in this country."[11]

Fourth, at least for the foreseeable future, this first global satellite communications system would be the only such system in the world, meaning that the entity controlling U.S. access would have a monopoly in the U.S. provision of international satellite communications services.[12] As one witness testified, the owner/operator of the first satellite system would have "a monopoly in the sense that he will be the sole seller of satellite communications services. The crucial question—one that has given rise to no little controversy here in Washington—is 'who shall be allowed to exercise this monopoly privilege?'"[13] Fifth, the only existing effective alternative means of international communication was transoceanic copper cable, a market in which the as-yet undivested AT&T already had over 90% monopoly control and 100% of the voice traffic market.[14]

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[11] *Communications Satellite Legislation: Hearings on S. 2650 and S. 2814 Before the Senate Comm. on Aeronautical and Space Science,* 87th Cong., 2d Sess. 388, 459 (1962) ("Space Hearing") (Testimony of Deputy Attorney General Nicholas deB. Katzenbach).

[12] *See generally* Appendix 1 at Section I.A.1; *see, e.g., Communications Satellites—Part 2: Hearings on H.R. 10115 and H.R. 10138 Before the House Comm. on Interstate and Foreign Commerce*, 87th Cong., 2d Sess. 564 (1962) ("*House Commerce Hearings*") (Testimony of Attorney General Robert F. Kennedy) ("in all probability, there will be only one commercial communications system using satellites").

[13] *Space Satellite Communications: Hearings Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business*, 87th Cong., 1st Sess. 89 (1961) ("Small Business Hearings") (Testimony of Leland L. Johnson, Chief Economist, The Rand Corporation).

[14] *See generally* Appendix 1 at Sections I.A.5 and I.B.

C. Congress Rejected Common Carrier Control of the U.S. Participant to Prevent Carrier Exploitation of the Necessary Exclusive Franchise on Access to the New Satellite System

The Administration and the Congress next had to decide who should own and operate that private corporation. As noted above, everyone recognized that a private entity would only raise and invest the necessary sums of capital to build the new satellite system if it received the right of exclusive U.S. access to that system. Hence, the entity would be in a unique position of receiving a government-sanctioned exclusive franchise. The common carriers proposed that the private entity be a consortium of the common carriers who would ultimately use the services of the satellite system.[15]

The Administration and Congress rejected this proposal for four principal reasons.[16] First, given AT&T's existing predominance in the international communications market, that company was sure to dominate the consortium by itself or through collusion, expanding into the international satellite business its existing monopoly power with respect to transoceanic cables. In the words of Attorney General Kennedy, a satellite corporation dominated by AT&T would, regardless of regulatory safeguards, "not have the same interest in promoting and guaranteeing nondiscriminatory use and equitable access to the system by competitors as would an independent corporation."[17] Second, AT&T had huge investments in underseas

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[15] *See, e.g.*, S. 2650, 87th Cong., 2d Sess. (1962) (proposing carrier joint venture).

[16] *See generally* Appendix 1 at Section I.A.5.

[17] *Communications Satellites—Part 2: Hearings on H.R. 10115 and H.R. 10138 Before the House Comm. on Interstate and Foreign Commerce*, 87th Cong., 2d Sess. 565 (1962) ("*House Commerce Hearings*") (statement of Attorney General Robert F. Kennedy).

cables, which might have led it to use its control over such a carrier consortium to retard the development of the new satellite system and thereby prevent obsolescence of AT&T's existing technologies. Such control by AT&T, it was feared, would hinder achievement of Congress's goal of promoting competition among different modes of communication technologies, *i.e.* "intermodal competition."[18] As Attorney General Kennedy testified, "it would be only natural for AT&T to consider in its policies the extent to which speedy expansion of satellite facilities would make obsolete facilities in which it now has huge investments."[19] Third, Congress and the Administration feared collusion among all of the carriers involved in such a consortium to the detriment of the ultimate consumers of communications services. The concern was that carriers would use the consortium's right of exclusive access (1) to reduce competition among themselves in the provision of communications services or the manufacture and sale of communication equipment, or (2) to limit potential competition in either of these markets by nonparticipating companies. Fourth, a carrier consortium would not afford private Americans the opportunity to invest directly in the creation of this new satellite system and, should the venture succeed, reap the benefits of the necessary government-sanctioned franchise on access to this system.

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[18] *See, e.g., Antitrust Problems of the Space Satellite Communications System: Hearing Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 176 (1962) ("*Judiciary Hearings*") (statement of Rep. William Fitts Ryan).

[19] *Communications Satellites—Part 2: Hearings on H.R. 10115 and H.R. 10138 Before the House Comm. on Interstate and Foreign Commerce*, 87th Cong., 2d Sess. 565, 570 (1962) ("*House Commerce Hearings*") (testimony of Attorney General Robert F. Kennedy).

D. Congress Created COMSAT as a Corporation Independent of the Incumbent Common Carriers and with Safeguards to Prevent Abuse of the U.S. Participant's Exclusive Franchise on Access to the Proposed Global System

Congress and the Administration opted instead for a private corporation that would be separate from and independent of the existing carriers. Rather than being controlled by these incumbent carriers, the new entity would represent all U.S. interests in the new system and provide access on a nondiscriminatory basis primarily as a "carriers' carrier." As the legislative history reflects: "equal access and nondiscriminatory use may most effectively be achieved by requiring the operator of the satellite system to act as a common carriers' common carrier."[20]

Soon before the passage of the Act, then-FCC Chairman Newton Minow explained this carrier's carrier role and the independence it would afford the new entity from the existing carriers: "The corporation will depend upon the carriers for its revenues; the carriers will depend upon the corporation for facilities."[21] Similarly, Senator Pastore, the floor manager for the legislation that became the Satellite Act, recognized that carriers would be COMSAT's "principal customers."[22] Although this private corporation, COMSAT, was to have the same

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[20] *Communications Satellite—Part 1: Hearings Before the House Comm. on Science and Astronautics*, 87 Cong., 1st Sess. 422-423 (1961).

[21] *Communications Satellite Act of 1962: Hearing on H.R. 11040 Before the Senate Comm. on Foreign Relations*, 87th Cong., 2d Sess. 27 (Aug. 10, 1962) (letter of Newton Minow to Sen. Mike Mansfield, Senate Majority Leader).

[22] 108 Cong. Rec. 16,873 (1962) "The only shareholder of the company that also will use the system will be the carriers themselves.... who will have an integral interest in the *rentals* to be charged them." *Communications Satellite Legislation: Hearings on S. 2814 and S. 2814, Amendment Before the Senate Comm. on Commerce,* 87th Cong., 2d Sess. 54 (1962) ("*1962 Senate Commerce Hearings*") (statement of Sen. John O. Pastore) (emphasis added).

exclusive access to the new satellite system as the proposed carrier consortium would have had, the Administration and Congress carefully structured COMSAT to avoid capture by the existing carriers, to ensure nondiscrimination through regulation, and to promote competition in every way possible, consistent with ensuring the shareholders of this new corporation the return on their investment to which they were entitled.

1. Congress Obligated COMSAT to Own and Operate the Global Satellite System and Granted COMSAT the Exclusive Franchise to U.S. Access to the System

Congress mandated that "United States participation in the global system shall be in the form of a private corporation."[23] Congress determined that COMSAT should be that "corporation" and commanded COMSAT to "plan, initiate, construct, own, manage, and operate itself or in conjunction with foreign governments or business entities" the new satellite system.[24] It also directed that COMSAT alone "furnish, for hire, channels of communication to United States communications common carriers and to other authorized entities,"[25] and granted only COMSAT the power "to contract with authorized users ... for the services of the communications satellite system."[26] All participants in the legislative debate recognized that, in so doing, Congress was vesting in COMSAT the exclusive franchise over U.S. access to the

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23 47 U.S.C. § 701(c).

24 47 U.S.C. § 735(a)(1).

25 47 U.S.C. § 735(a)(2).

26 47 U.S.C. § 735(b)(4).

new satellite system.[27] Congress, however, was careful to grant such a weighty power only "subject to appropriate regulation."[28]

2. Congress Guarded against Common Carrier Control Over COMSAT

To prevent carriers from doing an end run around Congress's rejection of the carrier consortium proposal and exploiting COMSAT's exclusive franchise, Congress erected several statutory safeguards.[29] First, neither an individual carrier, nor the carriers as a group, could own more than fifty percent of COMSAT's voting shares.[30] Second, any carrier wishing to own shares in COMSAT would have to receive FCC permission.[31] Third, no more than six of COMSAT's fifteen Directors could be elected by the shareholder carriers and no carrier could elect more than three directors, even if it owned 50% of the corporation's stock.[32] Fourth, Congress prevented indirect carrier control of COMSAT by forbidding any officer of

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27 *See generally* Appendix 1 at Section I.A.2. Indeed, even COMSAT's competitors recognized this exclusive role. In adamantly opposing the selection of COMSAT as the U.S. participant, AT&T stated that "[s]uch an intermediate carriers carrier entity, unprecedented in international communications, has never been found necessary or desirable . . . for provision of overseas communications services." House Commerce Hearings at 381 (reprinting Comments of American Telephone & Telegraph Company in FCC Docket No. 14024).

28 47 U.S.C. § 701(c).

29 *See generally* Appendix 1 at I.A.2, I.A.3, II.B.

30 47 U.S.C. § 734(b)(2).

31 47 U.S.C. § 734(b)(1).

32 47 U.S.C. § 733(a).

COMSAT from receiving any salary from any source other than the corporation during his employment by COMSAT.[33]

3. Congress Empowered the FCC To Ensure that COMSAT Faithfully Executes its Trust in a Nondiscriminatory and Pro-Competitive Manner

Because of the unique mission and franchise with which COMSAT was being entrusted, Congress subjected COMSAT to expansive and direct regulatory authority of the FCC and the President. Even though COMSAT was primarily to be a carriers' carrier, Congress declared COMSAT to be a *common* carrier for all purposes relating to the global system. Congress also specified in detail the Commission's regulatory authority over COMSAT.[34] It commanded the agency to insure that all carriers have nondiscriminatory access to the satellite system and satellite terminal stations.[35] It also vested the Commission with ratemaking authority to ensure that any economies from the system were passed on to consumers.[36] Congress even granted the FCC power to determine whether COMSAT could issue shares of capital stock or issue debt.[37] Finally, Congress directed the FCC to regulate and approve COMSAT's construction

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33 47 U.S.C. § 733(b).

34 47 U.S.C. § 741.

35 47 U.S.C. § 721(c)(2).

36 47 U.S.C. § 721(c)(5).

37 47 U.S.C. § 721(c)(8).

and operation of satellite terminal stations and additions to the satellite system or terminal stations.[38]

Because COMSAT was to be the sole U.S. participant in the global satellite system, Congress also granted the President the power to review the activities of COMSAT and to supervise the relationships of COMSAT with foreign governments, entities, and international bodies.[39]

4. Congress Explicitly Allowed Competition Where Possible

To the extent it was consistent with COMSAT's unique obligation to fund, own, and operate the construction of the global satellite communications system, Congress specifically permitted competition in the construction and operation of the satellite earth stations through which carriers would access that system.[40] In addition, Congress explicitly permitted the creation of additional global communications satellite systems if in the national interest, such that there might some day be facilities-based competition in the international satellite communications field.[41]

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38 47 U.S.C. § 721(c)(7), (9), (10).

39 47 U.S.C. § 721(a)(4).

40 47 U.S.C. § 721(c)(7).

41 47 U.S.C. § 701(d).

II. THE PLAIN MEANING OF THE SATELLITE ACT PREVENTS THE COMMISSION FROM MANDATING LEVEL 3 DIRECT ACCESS TO THE INTELSAT SYSTEM

When viewed in light of its statutory history and background, and when read in context as a coherent whole, the Satellite Act admits of only one reasonable interpretation: Congress vested COMSAT with the exclusive franchise on access to the new global communications satellite system. Congress granted COMSAT—alone among U.S. entities—the authority to "own" and "operate" this satellite system and to "furnish, for hire, channels of communication" to that system.

As discussed above, Congress erected in the Act an extensive system of structural and regulatory safeguards to prevent COMSAT from exploiting its exclusive franchise to the detriment of competition in the international communications market. To read the same Act as granting permission for direct access to the satellite system would circumvent these statutory safeguards and render them essentially meaningless. This plain, contextual reading of the Act is borne out by the fact that — in spite of monumental differences as to virtually every other issue under consideration — *not a single participant in the year-long debate on the Act ever disputed that COMSAT was to be granted an exclusive franchise over access to the system.* Moreover, in an unbroken string of decisions, the Commission and the courts have for almost forty years similarly recognized this congressional mandate of exclusive access through COMSAT. Congress, too, has remained steadfastly consistent in its view that COMSAT has an exclusive franchise to access INTELSAT.

A. The Language, Structure, and Context of the Satellite Act Prohibit the Commission from Ordering Direct Access

The Commission hangs its argument that the Satellite Act permits direct access on the absence in the Act of "terms of exclusivity"[42] or an express statement that access to the INTELSAT system must be "through COMSAT space segment."[43] Use of such phrases would have been redundant. Concepts of exclusivity suffused the statute and its enactment. The lack of particular phrasings cannot be outcome-determinative where the statute only makes sense if COMSAT's exclusive franchise is recognized. "Statutory construction . . . is a holistic endeavor."[44] Meaning is not determined by ripping a clause or phrase out of context or by imposing upon it an artificial and crabbed reading that undermines the coherence and effectiveness of an entire statutory scheme. Rather, as the Supreme Court emphasized just months ago, "context counts, and [we] stress in this regard what the Court has said [o]ver and over: In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[45]

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[42] *Notice* ¶ 24.

[43] *Notice* ¶ 25.

[44] *United Savings Ass'n. of Texas v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1978).

[45] *Regions Hospital v. Shalala,* 118 S. Ct. 917 (1998) *quoting United States Nat'l Bank of Or. v. Independent Ins. Agents of America Inc.* 508 U.S. 439, 455 (1993); *accord Robinson v. Shell Oil Co.*, 117 S.Ct. 873, 846 (1996) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used and the broader context of the statute as a whole.") (citations omitted); *Gustafson v. Alloyd Comp. Inc.*, 513 U.S. 561, 570 (acts of Congress "should not be read as a series of unrelated and isolated provisions"); *United States v. Nordic Villages, Inc.* 503 U.S. 30, 36 (1992) (noting the "well settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect"); *Massachusetts v. Morash*, 490 U.S. 107,

(Continued...)

In context, the statutory grant of authority to COMSAT to provide U.S. access to the new satellite system necessarily implies the absence of such authority for other carriers. Similarly, the statutory mandate of competition in other operations of the new satellite system implies the exclusivity of COMSAT's access to the new satellite system's space segment. Moreover, the extensive statutory protections against common carrier control of COMSAT would not make sense if COMSAT had not been granted the exclusive franchise over access to INTELSAT. Further, direct access would have fundamentally undermined both the construction of the new satellite system and the nondiscriminatory access to that system by U.S. consumers. Finally, an authorization of direct access would have made no sense if COMSAT had constructed the new satellite system by itself, a potential outcome expressly contemplated by the Act.

1. The Satellite Act Grants Only COMSAT the Right to Furnish, for Hire, Channels of Communication with the Global Satellite System

The language and structure of the Satellite Act establish that COMSAT was granted an exclusive franchise and that the FCC, therefore, lacks the authority to mandate Level 3 direct access.[46] Congress could have allowed participation through multiple private corporations, but

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(...Continued)
115 (1989); *Kmart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988); *United Savings Assoc. of Texas v. Timbers of Inwood Forest Assoc. Ltd.*, 484 U.S. 365, 371 (1987) ("Statutory construction is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme...."); *see also Brown & Williamson Tobacco Corp. v. FDA,* 153 F.3d 155, 162 (4th Cir. 1998) (noting the crucial role of context as a tool of statutory construction).

[46] *See generally* Appendix 1 at Section I.B.

it did not. The Act decrees that "United States participation in the global system shall be in the form of *a* private corporation."[47] The single "corporation" that Congress chose as the instrument of such participation is COMSAT.[48]

Contrary to the Commission's arguments, "participation" is not limited to ownership and operation, but includes the right of exclusive access. The Act explicitly sets forth the "authorized powers" of the corporation, as follows:

> In order to achieve the objectives and to carry out the purposes of this chapter, the corporation is authorized to —
>
> (1) plan, initiate, construct, own, manage, and operate itself or in conjunction with foreign governments or business entities a commercial communications satellite system;
>
> (2) furnish, for hire, channels of communication to United States communications common carriers and to other authorized entities, foreign and domestic; and
>
> (3) own and operate satellite terminal stations when licensed by the Commission under section 721(c)(7) of this title.[49]

This provision comprehensively defines the relationship of COMSAT with the new satellite system, with foreign governments and business entities, and with U.S. communications common carriers and other authorized foreign and domestic customers of the new satellite system. COMSAT is authorized to "construct," "own," and "operate" the new satellite system — either by itself or in conjunction with foreign governments or business entities. Although the provision does not explicitly say that COMSAT alone among U.S.

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47 47 U.S.C. § 701(c) (emphasis added).

48 *See* 47 U.S.C. §§ 702(8), 731.

49 47 U.S.C. § 735(a).

entities may construct, own, and operate the system, it need not. Congress elsewhere in the Act stated that the purpose of this provision is to establish the "participation in the global system . . . in the form of *a* private corporation," COMSAT.[50] Even the Commission admits that section 735(a)(1) makes COMSAT the "sole U.S. entity in INTELSAT activities that "plan, initiate, construct, own, manage, and operate" the satellite system."[51] What the FCC fails to recognize, however, is that when Congress in like terms in the same subsection authorized COMSAT to "furnish, for hire, channels of communication," it similarly had no need to specify that COMSAT alone among U.S. entities could provide those channels of communication with the new satellite system. The entire authorization was granted in the context of a statute constructed around the concept of U.S. participation in the satellite system through a single corporation.[52]

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[50] 47 U.S.C. § 701(c) (emphasis added).

[51] *See* Notice ¶ 23; *see also* Notice ¶ 15 ("we do not believe that the Commission currently has authority to implement Level 4 'investment' direct access under the [Satellite Act]").

[52] The Commission argues that the mandate that COMSAT be the sole U.S. participant in INTELSAT applies only to the ownership and operation provisions of the first paragraph of section 735(a), not the access provisions of the second. Notice ¶¶ 23, 24. That reading ignores the explicit mandate at the beginning of section 735(a) that all three authorized powers are to be exercised to achieve the objectives and purposes of the Act, which unambiguously include sole U.S. participation in INTELSAT through COMSAT. *See Richards v. United States*, 369 U.S. 1, 11 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but (should) look to the provisions of the whole law, and to its object and policy.'" (citations omitted)). *See also* 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.05 (1992).

Moreover, the first and third paragraphs of section 735(a) specify that particular entities may be involved with COMSAT in various INTELSAT-related activities. The first paragraph authorizes *foreign* business entities and governments to participate in the construction, ownership, and operation of the global satellite system. The third paragraph refers to Congress's authorization elsewhere in the statute for other carriers (alone, jointly, or with COMSAT) to own satellite terminal stations. The second paragraph—which authorizes COMSAT to "furnish, for hire, channels of communication" with the new satellite system—does not, however, mention any other entities. Under the doctrine of *expressio unius est exclusio alterius*, the express statement of one thing implies the exclusion of another not so mentioned.[53] The absence of any authorization in the second paragraph of section 735 for entities other than COMSAT to provide access to INTELSAT, when the two other surrounding and related paragraphs of section 735 do specify which other entities are permitted to participate with COMSAT, is further proof that Congress granted COMSAT exclusive access to the new satellite system.

This reading is confirmed by section 735(b)(4) of the Act which authorizes only COMSAT "to contract with authorized users . . . for the services of the communications satellite system."[54] Again, the statute which elsewhere is at pains to specify the precise roles

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[53] *See, e.g., Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) ("[E]xpressio unius est exclusio alterius: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted."); *See also Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978).

[54] 47 U.S.C. § 735(b)(4).

of common carriers makes no mention of and does not authorize their involvement in providing access to the global satellite system.

2. Congress Expressly Permitted Competition in Connection with Other Aspects of the INTELSAT System but Did Not Provide for Competition in Access to the System

The exclusivity of COMSAT's franchise on access is made clear by other provisions in the Act where Congress expressly permitted competition.[55] The Act is not a haphazard mishmash of unrelated provisions; rather, it is a comprehensive statute which sets out the areas in which COMSAT is granted exclusivity and the areas in which COMSAT would have to compete.

Although the access to the new satellite system was to be provided exclusively by COMSAT, Congress expressly authorized common carriers, by themselves, jointly, or in partnership with COMSAT to construct and operate the satellite terminal stations through which that access would be provided.[56] Congress even ensured that the FCC was to give no preference in authorizing such stations to either COMSAT or the common carriers. Congress also provided that additional communications satellite systems could be created if "in the national interest."[57] Thus, it recognized that, while COMSAT would always retain its exclusive franchise with respect to the satellite system it paid to build (i.e., INTELSAT), at some future time other competing satellite systems might be developed that would increase

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55 *See generally* Appendix 1 at Section I.B.2.c.

56 47 U.S.C. § 721(7).

57 47 U.S.C. § 701(d).

competition in the international communications market.[58] Further, Congress prevented COMSAT from using its role as Signatory and exclusive franchisee to the INTELSAT system to reduce competition in the market for equipment and services needed for the construction and operation of the INTELSAT system and satellite terminal stations.[59]

3. The Statutory Protections Against Common Carrier Dominance of COMSAT Are Meaningless if COMSAT Does Not Have the Exclusive Franchise over Access to INTELSAT

The exclusive nature of COMSAT's franchise over access to the INTELSAT system is also evident in the many carefully constructed provisions in the Act that prevent common carrier control over COMSAT as a corporation.[60] As detailed above, Congress limited the percentage of shares in COMSAT that could be owned by carriers, required FCC permission for carriers to hold COMSAT shares, enabled carriers to elect no more than six of COMSAT's fifteen board members, and prevented carriers from influencing officers of COMSAT by paying their salaries.[61] If carriers were to have had direct access to the INTELSAT system,

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[58] Through the development of this intramodal competition as well as the continued development of new technologies and increased intermodal competition, COMSAT's market power as exclusive franchisee to the INTELSAT system eventually declined to the point that the Commission declared it to be a non-dominant carrier in most geographic markets. *In Re Petition of COMSAT Corporation for Forbearance from Dominant Carrier Regulation and Reclassification as a Non-Dominant Carrier*, Order and Notice of Proposed Rulemaking, 14 FCC Rcd 14083 (1998) ("*Non-Dominance Order*").

[59] 47 U.S.C. § 721(c)(1).

[60] *See generally* Appendix 1 at Sections I.A.3, I.A.5, II. B.2.a-b.

[61] *See* 47 U.S.C. §§ 734(b)(2), 734(b)(1), 734(f), 733(a), 733(b).

COMSAT would have been just one service provider among many; there would have been no need for these statutory safeguards.

4. Direct Access to the INTELSAT System by Common Carriers Would Have Undermined Fulfillment of One of the Central Purposes of the Satellite Act

Reading the Act to permit the Commission to order direct access by carriers would also have fundamentally undermined a central element of the Act — the rapid construction of a global communications satellite system through private financing. Statutes are not to be construed in ways that frustrate their purposes.[62] The possibility that direct access might be mandated would plainly have hindered COMSAT's ability to raise capital for itself and for the construction of the new satellite system. As noted above, AT&T at the time controlled almost all of the U.S. market for international communications. If direct access had been permitted, AT&T would hardly have been willing to route its traffic through COMSAT and thus incur the obligation to pay fair rent. Rather, AT&T would have had every incentive to channel its traffic to INTELSAT directly, leaving COMSAT with little if any traffic to carry, and hence without a viable business and unable to carry out its statutory mission. In short, if direct access had been a possibility, the INTELSAT system might never have been created.

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[62] *See Rowland v. California Men's Colony*, 506 U.S. 194, 210 (1993) ("the statutes in question manifested a purpose that would be substantially frustrated if we did not construe the statute to reach artificial entities"); *Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998) ("A cardinal principle of interpretation requires us to construe a statute 'so that no provision is rendered inoperative or superfluous, void or insignificant.'" (citation omitted)); *See also C.F. Comm. Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997); Singer, *supra* note 52, § 46.05.

5. Direct Access Makes No Sense in the Context of a Satellite System Entirely Owned by COMSAT

Perhaps the most anomalous aspect of reading the Act to permit direct access is the very real possibility at the outset that COMSAT would have had to construct and own the new global satellite system by itself, without any foreign cooperation. Had that been the case, all access to the system would of necessity have been through COMSAT — the sole owner and operator of the system. It would have been odd, to say the least, for Congress to grant a *U.S.* franchise which could have been exclusive or non-exclusive depending on the existence or non-existence of *foreign* involvement in the venture[63] — and yet make no mention of that possibility in this carefully considered statute.

B. The Statutory Background and History of the Satellite Act Confirm that Congress Granted COMSAT an Exclusive Franchise To Access the INTELSAT System

1. All Parties Involved in Consideration of the Satellite Act Recognized that COMSAT Was to Be Granted Exclusive Access

As discussed above and as elaborated more fully in sections I.A.1 and I.D.1 of Appendix 1, all participants in the deliberations over the Satellite Act recognized that Congress was granting COMSAT an exclusive franchise over access to the new satellite system. This consensus is revealed by the various statutory proposals that were considered by Congress, the committee reports and hearings, and the testimony by participants in this debate. The competing proposals for carrier consortium participation and COMSAT participation both

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[63] Congress clearly contemplated either possible ownership outcome.

provided that whichever private entity was to serve as the vehicle for U.S. participation in the new system would be the exclusive provider of service to that system.[64] The exclusive franchise was recognized as a needed counterpart to the entity's obligation to finance the construction of the new global satellite communications system. The Administration recognized this,[65] the Congress recognized this,[66] the FCC recognized this,[67] and the common carriers recognized this.[68]

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64 *See* Appendix 1 at Section I.B.3.

65 *See, e.g., Communications Satellite Legislation: Hearings on S. 2814 and S. 2814, Amendment Before the Senate Comm. on Commerce,* 87th Cong., 2d Sess. 106 (1962) ("*Senate Commerce Hearings*") (statement by FCC Commissioner, Rosel H. Hyde) (COMSAT would be "one single, you might call it, a wholesaler of communications services to carriers").

66 *See, e.g., Communications Satellite—Part 2: Hearings Before the House Comm. on Science and Astronautics*, 87th Cong., 1st Sess. 721 (1961) (statement of Chairman Joseph E. Karth, House Science and Astronautics Committee) (the U.S. participant will have exclusive U.S. access but foreign participants would control usage in their own countries).

67 *See generally infra* Sections II.B.1, II.C.; *see, e.g., Communications Satellite Act of 1962: Hearing on H.R. 11040 Before the House Comm. on Foreign Relations*, 87th Cong., 2d Sess. 20 (Aug. 10, 1962) (Testimony of FCC Chairman Minow) ("capacity must be obtained, of course, from the satellite corporation").

68 *See, e.g., Communications Satellite—Part 1: Hearings Before the House Comm. on Science and Astronautics*, 87 Cong., 1st Sess. 75-76 (1961) (statement of Theodore F. Brophy, Vice President and General Counsel, GTE) (COMSAT "would serve as a common link for communications common carriers which would be its customers") (COMSAT "is thus analogous to a common terminal facility owned and operated by competing trucking companies or railroads and kept available for use by any future competing communications common carrier"); *Communications Satellites—Part 2: Hearings on H.R. 10115 and H.R. 10138 Before the House Comm. on Interstate and Foreign Commerce*, 87th Cong., 2d Sess. 549, 550 (1962) ("*House Commerce Hearings*") (Testimony of James E. Dingman, Executive Vice-President, AT&T) (expected that all users, whether shareholders or not, would pay "a fair rental" to the U.S. operating entity for its services).

2. The Consistent References to the U.S. Participant as a "Monopoly" Make No Sense If Direct Access Were Contemplated

The committee hearings, public testimony, and debate surrounding the enactment of the Satellite Act are replete with references to the fact that the sole U.S. participant in the new satellite system would have a "monopoly."[69] For instance, FCC Chairman Newton Minow testified that "there is going to be, no matter which way you go here, either a Government corporation or a private corporation, it will be a monopoly."[70] The President himself noted that "it must . . . be realized that such a system is by nature a Government-created monopoly."[71] His Deputy Attorney General advised the Senate Majority Leader that "[i]t is true that, at least for a number of years, only one commercial communications satellite system will probably be feasible. Therefore, under any system of organization, including Government ownership, there will be only a single system for some time, and in that sense a monopoly."[72] Of course, COMSAT could have had no monopoly if it did not have an exclusive franchise

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69 *See e.g.,* Appendix 1 at Sections I.A.2.

70 *Communications Satellite Act of 1962: Hearing on H.R. 11040 Before the House Comm. on Foreign Relations*, 87th Cong., 2d Sess. 73 (1962); *see also id.* at 297 (Testimony of Secretary of Defense McNamara) ("I believe it is a certain monopoly . . . whether the corporation is publicly owned or governmentally owned.").

71 Report of the House Comm. on Interstate and Foreign Commerce, H.R. Rep. No. 1636, 87th Cong., 2d Sess. 17 (Apr. 24, 1962) (App. A, letter from President John F. Kennedy).

72 *1962 Judiciary Hearings Part 1* at 28. *See also Communications Satellite Act of 1962: Hearings on H.R. 11040 Before the Senate Comm. on Foreign Relations*, 87th Cong., 2d Sess. 32 (1962)("*1962 Foreign Relations Hearings*") ((quoting Letter of Deputy Attorney General Nicholas deB. Katzenbach to Senate Majority Leader Michael J. Mansfield) (emphasis added).

over access to the new satellite system. Carriers could simply have connected directly to the new system and circumvented COMSAT. As discussed above, while COMSAT would have owned the U.S. share of the satellite system, ownership divorced from exclusive access would not have resulted in COMSAT's having monopoly control. The Satellite Act as currently read by the FCC is, thus, divorced from the reality of the year-long historic debate in Congress over the passage of the Satellite Act.

3. If Direct Access Were Contemplated, the Consistent References to COMSAT as the "Carriers' Carrier" Make No Sense

The committee reports and hearings, public testimony, and debate surrounding the consideration and enactment of the Satellite Act are also filled with references to COMSAT's role as the "carriers' carrier."[73] Approximately one week before the Act was passed,

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[73] *See e.g.*, *Communications Satellite Act of 1962: Hearing on H.R. 11040 Before the House Comm. on Foreign Relations*, 87th Cong., 2d Sess. 27 (Aug. 10, 1962) ("The corporation will depend upon the carriers for its revenues; the carriers will depend upon the corporation for facilities.") (quoting Letter of FCC Chairman Newton Minow to Sen. Mike Mansfield, Senate Majority Leader); 108 Cong. Rec. 16,873 (1962) (Statement of Senator Pastore, Senate floor manager) (carriers would "be the principal customers of COMSAT for the space segment services of the global system"); *Communications Satellite—Part 1: Hearings Before the House Comm. on Science and Astronautics*, 87 Cong., 1st Sess. 422-3 (1961) (comments of Lockheed Aircraft Corp.) ("equal access and nondiscriminatory use may most effectively be achieved by requiring the operator of the satellite system to act as a common carriers' common carrier"); *Communications Satellites—Part 2: Hearings on H.R. 10115 and H.R. 10138 Before the House Comm. on Interstate and Foreign Commerce*, 87th Cong., 2d Sess. 381 (1962) ("*House Commerce Hearings*") (AT&T attacking creation of "an intermediate 'carriers' carrier' entity"); *Antitrust Problems of the Space Satellite Communications Systems—Part 2: Hearings on S. 258 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 333 (1962) ("Judiciary Hearings") (Testimony of Bernard Strassburg, Ass't Chief of FCC Common Carrier Bureau) (the new entity "will be a wholesaler of channels to the existing carriers"); *Communications Satellites—Part 2: Hearings on H.R. 10115 and H.R. 10138 Before the House Comm. on*

(Continued...)

Chairman Minow testified that "the satellite corporation is a common carrier's common carrier."[74] There would, of course, have been no need for a "carriers' carrier" if the carriers could simply carry themselves to the new satellite system. Once again, the FCC's reading of the statute renders absurd the constant references to COMSAT as the "carriers' carrier."

4. Congress's Rejection of the Carrier Consortium Alternative Demonstrates that Congress Intended to Grant COMSAT an Exclusive Franchise over Access to the New Satellite System

As noted above, Congress specifically rejected — after extensive consideration — the proposal to create a carrier consortium to be the sole U.S. participant in the new global satellite communications system. Congress did so for several extremely important reasons, outlined above and discussed more fully in section I.B of Appendix 1.[75] Paramount was the concern that carriers — in particular AT&T — would exploit their control over access to the new satellite system to the detriment of non-participating carriers, the new satellite system

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(...Continued)
Interstate and Foreign Commerce, 87th Cong., 2d Sess. 407 (1962) ("*House Commerce Hearings*") (Testimony of FCC Chairman Newton Minow) ("Unlike those carriers, the Corporation will not furnish service to the general public. Its undertaking, rather, will be to furnish channels of communications to relatively few users; namely, common carriers and their foreign counterparts, who do serve the general public."). The Commission later determined that the Satellite Act does not prevent COMSAT from serving end users — but the agency only lifted its regulatory bar in conjunction with other actions to encourage more competition in the provision of earth station services. *Authorized User II*, 90 F.C.C. 2d 1394 (1982).

74 *Communications Satellite Act of 1962: Hearing on H.R. 11040 Before the House Comm. on Foreign Relations*, 87th Cong., 2d Sess. 20 (Aug. 10, 1962).

75 *See supra* Section I.D.

itself, and consumers.[76] As discussed above, with direct access the carriers would likely have dominated, if not controlled, the provision of access to the new satellite system — precisely the outcome that Congress rejected in the carrier consortium alternative.

C. For Almost Forty Years, the Commission and the Courts Have Explicitly Recognized that COMSAT Has an Exclusive Franchise Over Access to the INTELSAT System

As discussed more fully in section II of Appendix 1, the FCC has for almost forty years repeatedly acknowledged COMSAT's exclusive statutory franchise over access to the INTELSAT system. The FCC did so during Congress's consideration of the Satellite Act. Chairman Minow noted that "capacity must be obtained, of course, from the satellite corporation."[77] The Commission has continued to recognize COMSAT's exclusive franchise in decisions exercising the Commission's extensive regulatory authority over COMSAT. For instance, the FCC noted in 1966 that it "is not given authority to license any other U.S. carrier to operate the space segment .... Instead, such carriers must procure the space segment facilities from COMSAT."[78] The Commission similarly recognized in 1970 that COMSAT "is the chosen instrument to provide space segment facilities to licensees of earth stations in the

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[76] *See supra* Section I.D.2.

[77] *Communications Satellite Act of 1962: Hearing on H.R. 11040 Before the House Comm. on Foreign Relations*, 87th Cong., 2d Sess. 20 (Aug. 10, 1962); *id.* at 73 (Testimony of FCC Chairman Newton N. Minow).

[78] *In re Authorized Entities and Authorized Users Under the Communication Satellite Act of 1962*, 4 F.C.C. 2d 421, 438 (1966) ("*Authorized User I*").

United States."[79] In 1980, the FCC again confirmed "COMSAT's current monopoly at the wholesale level in the provision of INTELSAT services."[80] Courts have made clear that agency reversals of long-standing interpretations of statutes are "entitled to 'considerably less deference' than a consistently held agency view."[81]

Since the Satellite Act was passed, courts have often been called upon to opine on COMSAT's unique role as U.S. Signatory to INTELSAT and exclusive provider of U.S. access to that system.[82] The courts have repeatedly and explicitly acknowledged the common sense, plain language reading of the Act mandating COMSAT's exclusive access to the INTELSAT system. In 1984 the D.C. Circuit described COMSAT as "the U.S. representative to INTELSAT and the sole U.S. entity permitted access to the system."[83] The Southern District of New York in 1990 similarly found that "Congress intended to establish through a global system, a single provider of international satellite services to and from the United States," and that "Congress established COMSAT as a government-created monopoly."[84] On

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79 *Establishment of Regulatory Policies Relating to the Authorization Under Section 214 of the Communications Act of 1934 of Satellite Facilities for the Handling of Transiting Traffic,* 23 F.C.C.2d 9, 12 (1970).

80 *COMSAT Study–Implementation of Section 505 of the International Maritime Satellite Telecommunications Act*, 77 F.C.C.2d 564, 693 (1980) (Final Report and Order).

81 *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981).

82 *See generally* Appendix 1 at Section II.

83 *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1214 (D.C. Cir. 1984).

84 *Alpha Lyracom Space Communications, Inc.*, 1990-2 Trade Cas. (CCH) ¶ 69, 188 (S.D.N.Y. Sept. 30, 1990) (citing S. Rep. No. 1584, 87th Cong. 2d Sess. 28, 30 (1962)).

an appeal in that case, the Second Circuit in 1991 noted that Congress "created COMSAT to wield monopoly power,"[85] and made COMSAT "the sole provider of access to the global Satellite System to U.S. communications carriers."[86]

D. Congress's Passage of the Inmarsat Act in 1978 Confirms that Congress Granted an Exclusive Franchise to COMSAT in the Original Satellite Act

In 1978, Congress passed the International Maritime Satellite Telecommunications Act.[87] Congress patterned the Inmarsat Act after the Satellite Act, again designating COMSAT as the sole U.S. participant in an international satellite organization and again granting COMSAT an exclusive franchise to U.S. access of that system.[88]

1. All Participants in the Debate Over the Inmarsat Act Acknowledged that the Satellite Act Had Granted COMSAT an Exclusive Franchise Over Access to INTELSAT

As was the case with the Satellite Act, one of the principal points of contention in the debate over the Inmarsat Act was the question whether COMSAT or a carrier consortium should be designated as the U.S. operating entity, with exclusive access to the satellite

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85 946 F.2d 168, 174 (2d Cir. 1991) (reversing and remanding in part on other grounds).

86 946 F.2d at 175.

87 Pub. L. 87-624, codified at 47 U.S.C. §§ 751-57 [hereinafter "the Inmarsat Act"].

88 *See, e.g., International Maritime Satellite Telecommunications: Hearing on S.2211 and H.R. 11209 Before the Subcomm. on Communication of the Senate Comm. on Commerce, Science and Transportation*, 95th Cong., 2d Sess. 26 (1978) (letter from Patricia Wald, Assistant Attorney General, U.S. Dep't of Justice).

system.[89] Common carriers and others persistently argued that granting COMSAT this second franchise would "extend[] COMSAT's existing statutory monopoly into a new field."[90] COMSAT — in their words — would have a "stranglehold on satellite communications."[91] These concerns would, of course, have made no sense if direct access had been permitted in the Satellite Act.

Indeed, the FCC admits in its *Notice* that Congress did not, in the Inmarsat Act, permit direct access to Inmarsat. Importantly, however, despite the congressional focus on COMSAT's "monopoly" powers and upon the extension of these powers into the field of maritime satellites, there is not even a suggestion throughout the legislative history of the Inmarsat Act that lawmakers intended to give COMSAT greater access rights to the Inmarsat system than to INTELSAT. Surely if Congress were somehow enhancing COMSAT's

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89 *See generally* Appendix 1 at section III.A.

90 *International Maritime Satellite Act: Hearing on H.R. 11209 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. 69 (1978) (statement of Wladimir Naleszkiewicz, National Telecommunications and Information Administration). *See also International Maritime Satellite Telecommunications: Hearing on S.2211 and H.R. 11209 Before the Subcomm. on Communication of the Senate Comm. on Commerce, Science and Transportation*, 95th Cong., 2d Sess. 63, 65 (1978) (Testimony of Henry Geller, Ass't Secretary-Designate, Telecommunications and Information, U.S. Dep't of Commerce); *id.* at 137 (Testimony of Robert J. Angliss, Executive Vice-President, RCA Global Communications, Inc.); Report of the Senate Comm. on Commerce, Science, and Transportation, International Maritime Satellite Telecommunications Act, H.R. Rep. No. 1036, 95th Cong., 2d Sess. 5 (1978); *Merchant Marine Miscellaneous—Part 2: Hearings Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries,* 95th Cong., 2d Sess. 256 (Testimony of William Fishman, Office of Telecommunications Policy, Executive Office of the President).

91 *International Maritime Satellite Telecommunications: Hearing on S. 221 and H.R. 11209 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 2d Sess. 96 (1978) (statement of E.A. Gallagher, Chairman, Western Union International, Inc.).

"monopoly" powers through the Inmarsat legislation, this issue would have received extensive attention in the 1978 congressional hearings and debates.

2. The Language of the Inmarsat Act — Patterned After the Satellite Act — Confirms that the Satellite Act Granted COMSAT the Exclusive Franchise Over Access to INTELSAT

The Inmarsat Act provides that COMSAT "may establish, own, and operate the United States share of the jointly owned international space segment and associated ancillary facilities."[92] It also designates COMSAT "as the sole operating entity of the United States for participation in Inmarsat for the purpose of providing international maritime satellite telecommunications services."[93] The FCC concedes — on the basis of these two provisions — that the Inmarsat Act grants COMSAT an exclusive franchise over access to the Inmarsat system.[94] Yet the Commission contends that the absence of these two provisions in the Satellite Act demonstrates that the Satellite Act did not similarly vest COMSAT with an exclusive right of access to the INTELSAT system.[95] The agency's reading is incorrect. Indeed, a comparison of these two provisions with their counterparts in the Satellite Act further shows that the Satellite Act did in fact grant COMSAT exclusive access to the INTELSAT system.

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92 47 U.S.C. § 752(b)(4).

93 47 U.S.C. § 752(a)(1).

94 *See Notice* ¶ 29.

95 *See id.* ¶ 29.

The similarities between the related provisions in the two acts are striking. The differences may be explained simply by virtue of the fact that the drafters of the Inmarsat Act benefited from the knowledge gained through years of implementation of the Satellite Act and the creation, deployment, and operation of the INTELSAT system. When the Satellite Act was passed, satellite terms of art did not exist and the technology was uncertain. Moreover, INTELSAT was not an existing entity; the structure of any international consortium was unknown.

The Inmarsat Act may designate COMSAT as the "sole operating entity of the United States for participation in Inmarsat," but the Satellite Act provides that "United States participation in the global system shall be in the form of a private corporation."[96] Both statutes refer to participation by a single entity — COMSAT. It is hard to see how one more readily establishes an exclusive franchise than the other.

In addition, the Inmarsat Act may explicitly refer to COMSAT's ownership and operation of the United States share of "space segment," but the Satellite Act grants COMSAT authority to "furnish, for hire, channels of communication."[97] The term "space segment" may not have existed in 1962, but the concept is just as clearly expressed in the Satellite Act as in the Inmarsat Act.[98] Similarly, neither act uses the term "exclusive" when referring to this right

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96 *Compare* 47 U.S.C. § 752(a)(1) *with id.* § 701(c).

97 *Compare* 47 U.S.C. § 752(c)(4) *with id.* § 735(a)(2).

98 Participants in the 1962 debate over the Satellite Act clearly used the terms "channels of communication" to refer to what we speak of as "space segment." *See, e.g.. Antitrust Problems of the Space Satellite Communications System—Part 2: Hearings on S. 258 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 87th Cong., (Continued...)

of COMSAT to operate the "space segment" or provide "channels of communication," but the context and meaning of both acts is clear. Having conceded that the Inmarsat Act grants COMSAT an exclusive franchise over access, the Commission must concede the same as to the Satellite Act. When "provisions of [an] original act or section . . . are repeated in the body of [an] amendment, either in the same or equivalent words," the "[w]ords and provisions used in the original act or section are presumed to be used in the same sense in the amendment."[99]

III. MANDATING LEVEL 3 DIRECT ACCESS WOULD OBLIGATE THE U.S. GOVERNMENT TO COMPENSATE COMSAT FOR THE TAKING OF PROPERTY AND OR FOR BREACHING THEIR REGULATORY CONTRACT

For the reasons set forth in the accompanying Opinion of Law,[100] the Commission's order of Level 3 direct access to INTELSAT would invade COMSAT's property rights, subjecting the U.S. government to liability for at least three reasons:

- Level 3 direct access would breach the regulatory contract between the U.S. government and COMSAT.
- Because Level 3 direct access would destroy COMSAT's legitimate, investment-backed expectations, it would constitute a regulatory taking, in violation of the Fifth Amendment's Takings Clause.[101]

(...Continued)
2d Sess. 333 (1962) ("Judiciary Hearings") (Testimony of Bernard Strassburg, Ass't Chief of the FCC Common Carrier Bureau).

[99] *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 522 (1st Cir. 1987) (quoting 1A C. Sands, *Sutherland on Statutory Construction* § 22.33 (4th ed. 1985).

[100] See Opinion of Law Concerning the Constitutionality of the Commission's Proposal in Direct Access to the INTELSAT System, IB Docket No. 98-192, to Require Level 3 Direct Access to Space Segment Capacity on the INTELSAT System from J. Gregory Sidak to Warren Zeger, Vice President and General Counsel, COMSAT Corporation, December 22, 1998 ("Sidak Opinion Letter").

- Level 3 direct access would constitute a permanent physical invasion of COMSAT's property and, as such, would be a *per se* taking of COMSAT's property.

Under all three of these theories, COMSAT would have a claim against the United States for COMSAT's expectation damages. To adequately compensate COMSAT for the taking of its property, which the current proposal fails to do, the FCC would have to adopt an access pricing rule that would ensure COMSAT's recovery of its cost of forgoing sales, in a competitive marketplace, of INTELSAT space segment capacity to U.S. carriers and users.

A. Level 3 Direct Access Would Breach the Regulatory Contract

Based on flawed interpretations of the Supreme Court's decisions in *The Binghampton Bridge* and *United States v. Winstar*, the *Notice* refuses to acknowledge that an enforceable legal relationship exists between COMSAT and the United States. This legal relationship gives COMSAT a right to compensation for economic losses arising from unilateral and opportunistic changes in regulatory policy.

COMSAT would not have undertaken the extensive investments required to provide regulated service in the United States without the opportunity to recover its costs. Congress chose to participate in a global satellite system through a private corporation, COMSAT, which it did not fund.[102] To the contrary, Congress charged COMSAT with helping finance the global satellite system, regulated COMSAT as a common carrier, limited its capital

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(...Continued)

101 U.S. Const., Amend. V.

102 *See* Appendix 1 and Sections I.A.6, I.B.

structure, and required it to serve, at considerable expense, as U.S. Signatory to INTELSAT.[103]

In exchange, COMSAT was granted the right to serve as the exclusive provider of INTELSAT services in the United States. Indeed, the primary means by which COMSAT recovers and earns a competitive return on its invested capital is by selling, at retail, access to space segment capacity on the INTELSAT system. Level 3 direct access would allow users and carriers to gain the use of facilities owned by COMSAT, without compensating COMSAT. Terminating COMSAT's exclusivity and allowing Level 3 direct access to users would, accordingly, dramatically reduce its revenue.

In addition to its massive investment in the INTELSAT system and in its retail business, COMSAT has made contractual commitments for up to 15 years in the future, reserving space segment capacity in the INTELSAT system based on COMSAT's contracts with its customers. Level 3 direct access would allow direct access customers to bypass COMSAT, thus denying COMSAT the opportunity to recoup the costs of its investments and a competitive, risk-adjusted return on its invested capital.

Well-established caselaw supports the fact that COMSAT's exclusive right to sell access in the United States to INTELSAT's space segment "was a contract, the obligation of which cannot be impaired by subsequent legislation, or by a change in her organic law," without just

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[103] And in recognition of COMSAT's statutory rights vis-à-vis the retail carriers, the Commission restricted COMSAT from undertaking certain activities, including the pursuit of otherwise valuable business opportunities, during the less competitive environment of the past.

compensation.[104] The lack of an express promise, upon which the FCC relies in denying the existence of any such agreement, does not vitiate this conclusion.

The Supreme Court's decision in *Winstar* confirms the existence of this binding agreement.[105] In *Winstar*, the Court held that the government had to compensate healthy thrifts that the government had induced to merge with failing ones for the breach of its promise to keep in place the then-existing regulatory scheme. After Congress changed the capital requirements, causing several formerly healthy thrifts to fail, the Court held that the government had to indemnify those thrifts for the effects of those changes.

The FCC's attempt to distinguish *Winstar* as inapposite to the restructuring of network industries is unsustainable. Seven justices in *Winstar* stressed cost recovery, incentive for investment, potential government opportunism, and the government's need to make credible commitments — all of which are valid considerations here. *Winstar* confirms the vitality of the reasoning of earlier decisions construing the rights and remedies of public utilities under their regulatory contracts with municipalities.[106]

The Satellite Act and the regulations under which it was created and operates gave rise to a bilateral economic relationship between the United States and COMSAT. The United States induced COMSAT and its investors to make substantial investments in INTELSAT to

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104 *New Orleans Water Works v. Rivers*, 115 U.S. 674, 681 (1885).

105 *United States v. Winstar*, 116 S.Ct. 2432 (1996).

106 Congress certainly may amend the Satellite Act to order Level 3 direct access. In that case, however, the government would have an obligation, under either the Takings Clause or the common law of contracts, to pay for damages to private parties whose investment-backed expectations it would destroy.

serve U.S. interests. The heart of the bargain was that COMSAT would be contractually committed to make capital investments in and related to INTELSAT. In exchange, COMSAT received the opportunity to receive a return of, and a competitive return on, those investments. As in *Winstar*, "it would have been irrational"[107] for COMSAT to have committed to making such investments without a credible promise from the U.S. government either (1) to grant COMSAT an exclusive franchise to serve the U.S. market, or (2) to compensate COMSAT in damages if the United States changed its mind. By preventing COMSAT from earning a retail margin on the sale of services on a competitive satellite network in which it has invested, the FCC's imposition of Level 3 direct access would breach the bargain between the U.S. and COMSAT.

As the Sidak Opinion Letter points out, the *Notice's* cursory analysis skips over 130 years of caselaw enforcing regulatory contracts against government bodies.[108] The *Notice* also errs in relying on Congress's reservation of the right to "repeal, alter, or amend" the Satellite Act.[109] Congress's (unnecessary) reservation of that right does not give it the power to violate the Constitution by taking COMSAT's property without compensation or by breaching its contract with COMSAT. "The simple words ... that Congress may at any time alter, amend, and repeal this act ... cannot be used to take away property already acquired under the operation of the charter, or to deprive [a private] corporation of the fruits actually reduced to

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107 116 S.Ct. at 2449.

108 Sidak Opinion Letter at 14.

109 47 U.S.C. § 732.

possession of contracts lawfully made."[110] Nor can such a provision be construed as meaning that, *ab initio*, no contract was created between the U.S. Government and COMSAT. "It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that, in one of the sudden changes of public opinion to which all municipalities are more or less subject, the city might ... practically extinguish the rights it had already granted the company."[111]

B. Level 3 Direct Access Would Constitute a Regulatory Taking, Obligating the U.S. Government to Pay Just Compensation

A regulation constitutes a taking if it denies the property owner "economically viable use" of that property.[112] This is determined by examining: (1) the "character of the government action," (2) the "economic impact of the regulation on the claimant," and (3) the "extent to which the regulation has interfered with distinct investment-backed expectations."[113] The key to this analysis, generally and in this context as well, is the third prong, which is a "way of limiting taking recoveries to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime."[114]

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110 *The Union Pac. R. Co. v. US*, 99 U.S. 700, 720 (1878).

111 *City of Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 17-18 (1898).

112 *Penn Central Transp.* Co. v. New York City, 438 U.S. 104, 124 (1978).

113 *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979).

114 *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994).

The previous discussion of the regulatory contract between COMSAT and the U.S. government demonstrates that COMSAT and its investors "bought their property in reliance on a state of affairs that did not include" anything resembling Level 3 direct access.[115] As shown below, therefore, Commission imposition of Level 3 direct access would give rise to a claim by COMSAT for its expectation damages.

C. Level 3 Direct Access Would Constitute a Permanent Physical Occupation of COMSAT's Property and Thus A Per Se Taking, Obligating the U.S. Government to Pay Just Compensation

The Supreme Court has made clear that "when the 'character of government action' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[116] Under *Loretto*, the extent of the physical invasion does not matter; an owner must be compensated for the impairment of his "power to exclude the occupier from possession and use of the space."[117]

Level 3 direct access would enable COMSAT's current customers to physically occupy the circuit and transponder capacity of INTELSAT's satellites, of which COMSAT is a co-owner. As a result, the practical effect of direct access would be to deny COMSAT, the owner of the circuit, the right to exclude third parties from the use of COMSAT's property. This

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115 *Id.*

116 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982) (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (citation omitted)).

117 *Id.* at 435 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 ; Restatement of Property section 7 (1936)).

infringement would constitute a "permanent physical occupation authorized by state law," and would therefore be a taking "without regard to whether the State, or instead a party authorized by the State is the occupant."[118] It is irrelevant that "the U.S. would not be a party to the service agreement or in the arrangement."[119]

The *Notice* maintains that "Level 3 direct access is a voluntary contractual arrangement between a U.S. carrier or user and INTELSAT that permits use, but not permanent physical occupation, of INTELSAT satellites."[120] But because COMSAT would not be involved in the arrangement between INTELSAT and the carrier or user exercising its right to direct access (except to the extent that the Commission *required* COMSAT to consent to such arrangements),[121] the invasion of COMSAT's property cannot possibly be characterized as "voluntary." Nor could the U.S. government avoid liability by claiming that COMSAT has historically been closely regulated. "The facts that an industry is heavily regulated, and that a property owner acquired the property knowing that it is heavily regulated, do not diminish a physical taking to something less than a taking."[122]

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118 458 U.S. at 432 n.9.

119 *Notice* ¶ 38 (footnote omitted).

120 *Notice* ¶ 38.

121 *Id.* ¶ 19.

122 *Gulf Power v. United States*, 998 F. Supp. 1386, 1394 (N.D. Fla. 1998) *(quoting GTE Northwest Inc. v. Public Util. Comm'n*, 321 Ore. 458, 900 P.2d 495, 504 (Or. 1995) and citing J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. Rev. 851, 951-52 (1996)).

Thus, if the FCC were to order Level 3 direct access to the space segment capacity of INTELSAT, *Loretto* would apply and the U.S. government would be *per se* liable to COMSAT for a taking of its property. The question of measuring the sufficiency of damages for just compensation would then be presented.[123]

* * *

In sum, imposing Level 3 direct access to the INTELSAT system would violate the Fifth Amendment's Takings Clause and, under common law principles, breach the regulatory contract between the U.S. government and COMSAT. If the FCC were to adopt its proposed rule, without providing an off-setting cost-recovery mechanism, COMSAT would be entitled to damages in the amount of its lost expectation of recovering the cost of, and a competitive return on, its interest in INTELSAT. Rather than imposing such a liability on the U.S. Treasury, or reintroducing rate regulation where it is not warranted, the FCC should not institute Level 3 direct access.

IV. THE ECONOMIC AND POLICY REASONS WHICH FORMED THE BASIS FOR THE COMMISSION'S PRIOR REJECTION OF DIRECT ACCESS AS CONTRARY TO THE PUBLIC INTEREST ARE MORE SUBSTANTIAL TODAY

Even if the Commission had the authority to implement its direct access proposal, there is no economic, policy or factual basis for reversing its 1984 determination that direct access would not serve the public interest. The reasons that justified the agency's decision fourteen

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123 This issue is addressed in Section VI *infra*.

years ago are still valid, but the "adverse consequences" that weighed against direct access then are far more substantial today.

Allowing INTELSAT to have direct access to the U.S. market before it agrees to fully privatize could create incentives to delay or derail the privatization process altogether. The entry of a tax-exempt satellite operator directly into the U.S. market inevitably will distort competition, as will the pricing of direct access at the below-cost levels of the IUC. It would therefore be arbitrary and capricious for the Commission to conclude that direct access is in the public interest today.

However, in the event the FCC elects to ignore these realities and risk the adverse consequences of direct access, implementing a Level 3 direct access regime would compel the Commission to devote time and resources to setting an appropriate surcharge (or surcharges) over the IUCs for different types of INTELSAT capacity. As the *Notice* recognizes, direct access at the IUCs would not allow COMSAT to recover the costs it incurs on behalf of all U.S. users as the U.S. Signatory to INTELSAT, nor do the IUCs in a Level 3 environment allow for a compensatory return on COMSAT's substantial investment in INTELSAT. This complex task - which would effectively place the Commission back in the business of detailed regulation of COMSAT's costs and rates - is particularly wasteful because it would become moot when INTELSAT is privatized, and that event is currently anticipated for 2001. It would also be inconsistent with non-dominant carrier status to engage in rate regulation of COMSAT services in competitive markets.

Finally, the implementation of direct access in other countries does not provide a rational basis for the FCC to adopt Level 3 in the United States. Direct access has never been implemented in a nation in which the Signatory was specifically created to invest and

participate in INTELSAT and whose primary profit-making function was to provide INTELSAT service to domestic users on a nondiscriminatory basis. Rather, it is used in other nations to promote competition by allowing new entrants to bypass the vertically-integrated PTT monopolies so as to obtain international transmission capacity. And of the 93 countries cited in the *Notice* as permitting Level 3 direct access, it is instructive to note that only four offer blanket direct access permitting the same level of access to each company in its territory—the approach now under consideration is this proceeding.

For a comprehensive explanation of all these matters, and specific responses to questions raised in the *Notice*, we urge the Commission to refer to the economic analysis prepared by Professors Jerry R. Green and Hendrik S. Houthakker of Harvard University and Johannes P. Pfeifenberger of The Brattle Group. That analysis is attached hereto as Appendix 3, and incorporated herein by reference.[124]

A. The Facts Justifying the Commission's Rejection of Direct Access in 1984 Are Even More Compelling and Relevant in 1998

In 1982, the Commission commenced a rulemaking proceeding at the request of U.S. carriers to allow them to have direct access to the INTELSAT system. The carriers contended that direct access would allow for greater competition to COMSAT in the provision of international communications services and would lower prices to consumers. After almost two

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[124] Statement of Professors Jerry R. Green and Hendrik S. Houthakker, Harvard University, and Johannes P. Pfeifenberger, The Brattle Group, *An Economic Assessment of the Risks and Benefits of Direct Access to INTELSAT in the United States* (hereinafter "Brattle Analysis").

years of study, the FCC determined that direct access would not serve the public interest.[125] Not only did it become clear to the agency that direct access was unlikely to lower prices to consumers, but the FCC found that the "adverse consequences" of direct access outweighed any potential public benefits. The facts today demonstrate, to an even more compelling degree, that direct access continues to be unjustified for any economic or policy reasons.

1. The Commission's Findings in 1984 Are Even More Soundly Based Today

Specifically, the Commission concluded in 1984 that direct access would harm competition by leading to undue concentrations of control by U.S. carriers with direct access to satellite capacity on the INTELSAT system, at the same time that these carriers were owners and operators of competing undersea copper cable facilities. The Commission also found that it would not serve the public interest to adopt direct access proposals that would have the effect of "balkanizing" the single voice of the U.S. Signatory within INTELSAT, thereby lessening the influence and ability of the United States to take a leadership role within the organization. Finally, the Commission found "very little to be gained from [adopting direct access] in terms of cost savings or increased efficiency,"[126] and concluded that "[w]e are unpersuaded that,

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125 *In the Matter of Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the U.S. International Service Carriers,* Report and Order, 97 FCC 2d 296, 298 (1984) ("*1984 Order*"), *aff'd sub nom. Western Union Int'l v. FCC*, 804 F.2d 1280 (D.C. Cir. 1986).

126 *1984 Order*, 97 FCC 2d at 318 [emphasis added].

whatever benefits are to be derived, they would be so substantial as to outweigh the adverse consequences which are likely to attend the adoption and implementation of direct access."[127]

As the following summary indicates, the very factors relied upon by the FCC in its 1984 decision are more valid today, and the current market facts further strengthen the 1984 conclusions.

- **The INTELSAT Utilization Charge ("IUC") "is not a measure of COMSAT's cost of providing satellite circuits acquired from INTELSAT to its customers in the United States."**[128] Rather, the FCC found that "INTELSAT has a unique financial structure"[129] and that as a result, the IUC "is not intended to, and does not include any amount to compensate COMSAT for the internal costs which COMSAT incurs making satellite circuits available to U.S. customers" or conducting its duties as U.S. Signatory under the INTELSAT Agreements and the Satellite Act."[130] As shown below and in the Brattle Analysis, this conclusion remains just as true today.[131]

- **"[T]he amount of compensation that COMSAT receives as a return on its INTELSAT investment through the IUC mechanism does not provide COMSAT a full return on its total investment in INTELSAT."**[132] This 1984 finding also remains true, despite the *Notice*'s tentative (but unsupported) conclusion that IUCs alone could provide COMSAT with a "reasonable opportunity to earn a fair return on its investment from INTELSAT."[133] INTELSAT's basic financial structure has not changed in

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127 *Id.* at 298 [emphasis added].

128 *Id.* at 311.

129 *Id.* at 311.

130 *Id.* at 311.

131 Brattle Analysis at 23-25.

132 *1984 Order* at 312.

133 *Notice* at ¶ 43.

the intervening years in any way that would modify this determination.[134] And, as the Commission recognized fourteen years ago, COMSAT's rates to its carrier customers continue to include a number of legitimate expenses that are not recovered via the IUC mechanism.

- **"We find very little to be gained from [direct access] in terms of cost savings or increased efficiency."**[135] The FCC determined in 1984 that Level 3-type direct access would be a poor substitute for actual alternative providers of international transmission services. Today, and unlike in 1984, the presence of substantial facilities-based competition in the international marketplace dictates COMSAT's prices. As shown below and in The Brattle Analysis, however, the current proposal for Level 3 direct access is not predicated on true efficiency gains but rather would provide certain U.S. users an opportunity to acquire INTELSAT capacity at below-cost rates, while COMSAT would be saddled with the adverse consequences.[136]

- **Even if any savings might potentially result, "there would be no guarantee that the carriers would flow-through these savings to end users."**[137] In 1984, the cost of space segment capacity represents only a fraction of the cost of a basic international telephone call. With the substantial reductions in satellite rates since then, space segment costs today constitute an even smaller portion of the international calls. Any savings would amount to only a fraction of a percentage point of the total end-user charge. Yet absent some way to ensure that COMSAT's U.S. carrier customers flowed-through even these small potential savings to consumers, the FCC found no basis to conclude that end-users would benefit in any cognizable way from direct access.[138] There is no basis for a different conclusion today.

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134 *1984 Order* at 313-15. The Commission concluded that "direct access *in any form* would not appreciably diminish any of the expense elements ... which comprise the space segment portion of COMSAT's tariff. Were we to adopt direct access, at best we would merely be dividing certain fixed space segment-related costs between COMSAT and others." *Id.* at 318.

135 *1984 Order* at 318.

136 Brattle Analysis at 13-15.

137 *1984 Order* at 316.

138 *1984 Order* at 325.

- **"[D]irect access ... could also adversely affect COMSAT's ability to effectively express, promote, and protect the national and foreign policy interests of the United States before INTELSAT."**[139] This justification has heightened significance today as the United States works to push INTELSAT privatization forward. If the major U.S. carriers are allowed to become direct contractual customers of INTELSAT prior to privatization, their ability to balkanize the U.S. voice within INTELSAT will most certainly emerge, and their competitive agenda as owners of fiber-optic systems is liable to jeopardize the most pro-competitive outcome.

2. None of the Events of the Past Fourteen Years Cited by the *Notice* Provides a Rational Basis for Reversing the Commission's Prior Conclusion

Admittedly, much can happen in fourteen years to warrant a reexamination of these conclusions. The *Notice* correctly reports, for instance, that the FCC's analysis took place before INTELSAT developed its program of Level 3 and 4 direct access to accommodate liberalization in other countries. The *Notice* fails to note, however, that one of the direct access models it evaluated in the *1984 Order*—the so-called "capital lease" proposal—is for all intents and purposes identical to INTELSAT's Level 3 direct access option.[140] Accordingly, this particular "change in circumstances" identified in the *Notice* does not alter, in any respect, the result reached by the Commission in 1984.

Other changed circumstances the *Notice* relies upon consist of user requests for direct access, the fact that COMSAT continues to be regulated as a dominant carrier in some

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139 *1984 Order* at 325.

140 "Option 1" discussed in the *1984 Order*—also known as the "capital lease" option—would have required COMSAT to continue to make capital investments in INTELSAT and to unbundle its tariffs while allowing international carriers to obtain INTELSAT capacity on a "cost-pass-through" basis, with a ministerial fee to be paid to COMSAT for "administrative and maintenance" costs.

markets, and that other countries have implemented direct access in recent years. These reasons for reversing the 1984 conclusions do not withstand scrutiny. First, customer requests for direct access are hardly new — they were made in the early 1980s as well. The proper question for the FCC is not whether some customers would gain, but whether their gains would reflect genuine efficiencies or simply arise at the expense of others (such as COMSAT or U.S. taxpayers). As demonstrated in the Brattle Analysis, any gains produced by Level 3 direct access would be artificial, and as a result, would distart competition.

Second, COMSAT's lingering classification as a "dominant carrier" for some services on some routes is not a persuasive rationale for direct access. Since COMSAT's "dominance" did not justify direct access in 1984, direct access logically is even less justified today when COMSAT is classified as non-dominant for the major portion of its INTELSAT services.[141] Allegations of inflated COMSAT "mark-ups" also reflect a basic misunderstanding both of the IUC charges and COMSAT's true margins - a misunderstanding that the FCC did not have in 1984.

Third, that INTELSAT now offers direct access programs which many countries have adopted is equally unpersuasive. As noted, the direct access options considered and rejected in 1984 were essentially identical to the Level 3 and Level 4 direct access options under consideration now. Moreover, the critical flaw in this rationale is that the situation in other countries differs fundamentally from that in the United States, and the vast majority of countries referenced by the FCC do not implement INTELSAT's program as the FCC

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[141] *COMSAT Non-Dominance Order*, 13 FCC Rcd 14083.

proposes to do in the United States. This point is elaborated upon more fully in subsection C below, but COMSAT will note here that direct access in other countries is largely a way to spur competition in the face of structural bottleneck problems arising from the presence of a vertically-integrated PTT — a situation that most certainly does not exist in the United States.

3. Other Developments, Including the Tremendous Growth in Competition in International Services Since 1984, Further Compels Rejection of Level 3 Direct Access

The desire for direct access is predicated on the notion that it might somehow lead to appreciably lower prices and/or greater facilities-based competition. But the *Notice* identifies no relevant facts to support a reasoned justification that Level 3-type direct access is required to accomplish these objectives.[142] Rather, the only facts before the agency today demonstrate—

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[142] At a minimum, the Commission must be able to point to facts in the record before it in order to justify a departure from its 1984 rejection of direct access. *See, e.g., National Black Media Coalition v. F.C.C.*, 775 F.2d 342, 355 (D.C. Cir. 1985) (holding that while "an agency does have the right to develop new policies and methodologies . . . it is also a clear tenet of administrative law that if the agency wishes to depart from its consistent precedent, it must provide a principled explanation for its change of direction"); *Airmark Corp. v. FAA,* 758 F.2d 685, 691-92 (D.C. Cir. 1984); *United States Satellite Broadcasting Co. v. F.C.C.*, 740 F.2d 1177, 1187 (D.C. Cir. 1984). Certainly INTELSAT's institution of direct access mechanisms is not such a principled explanation. The Commission did not base its 1984 decision on any suggestion that direct access might have been infeasible because it conflicted with INTELSAT's operational rules and policies. Instead, that decision was solidly founded on U.S. policy and marketplace facts.

The Commission also points to COMSAT's status as a dominant carrier for a few so-called thin routes and the fact that certain customers are seeking direct access. With respect to the first point, the Brattle Analysis notes that while COMSAT is still deemed "dominant" on some thin routes, the rates charged on those routes reflect competitive, globally averaged rates that are on file with the FCC. *See* Brattle Analysis at 50. Those rates thus are presumptively competitive and deemed lawful. Moreover, the number of thin routes identified by the Commission in the COMSAT *Non-Dominance Order* is already obsolete and continues to decline.

as the Commission has acknowledged in the COMSAT *Non-Dominance Order*—that *facilities-based competition* in the U.S. international marketplace *has grown significantly in* the *absence of direct access*, providing consumers with a range of price and service options for international transmission capacity unimaginable in 1984. Specifically, the following pro-competitive changes have occurred since the FCC last rejected direct access:

- The authorization of separate satellite systems in July 1984.[143]
- The deployment of transoceanic fiber-optic cables beginning in July 1988.
- The end of "balanced loading" guidelines in January 1989.[144]
- The adoption of the so-called *DISCO-I* policy in January 1996.[145]
- The reclassification of AT&T as a non-dominant international carrier in May 1996.[146]
- The end of PSTN restrictions on separate systems in December 1996.[147]

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[143] *See Establishment of Satellite Systems Providing International Communications,* 101 FCC 2d 1046, 1178-79 (1985) (Report and Order), *recon.,* 61 Rad. Reg. 2d (P&F) 649 (1986).

[144] *Policy for the Distribution of United States International Carrier Circuits Among Available Facilities During the Post-1988 Period,* 3 FCC Rcd 2156, 2160 (1988) (Report and Order) (reviewing history of loading policy).

[145] *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems,* 11 FCC Rcd 2429 (1996) (Report and Order) ("*DISCO-I Order*").

[146] *Motion of AT&T Corp. to be Declared Non-Dominant for International Service,* 11 FCC Rcd 17963 (1996) (Order) *("AT&T International Non-Dominance Order")*

[147] *See Permissible Services of U.S. Licensed International Communications Satellite Systems Separate from the International Telecommunications Satellite Organization (INTELSAT)*, 7 FCC Rcd 2313, 2314 (1992) (Order) ("*Permissible Services Order*").

- The adoption of the WTO Agreement on Basic Telecommunications in February 1997 and its U.S. implementation beginning in February 1998.[148]

- The Hughes-PanAmSat merger in April 1997.[149]

- The Loral-Orion merger in February 1998.[150]

- The reclassification of COMSAT as a non-dominant international carrier in April 1998.[151]

- The Teleglobe-Excel merger in September 1998.[152]

- The MCI-WorldCom merger in September 1998.[153]

- The spin-off of New Skies Satellites, N.V., from INTELSAT in November 1998.[154]

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[148] World Trade Organization Agreement on Basic Telecommunications Service, February 1997. *See* "WTO Telecoms Deal Will Ring in the Changes on 5 February 1998," WTO Press Release, 26 January 1998. The WTO Agreement was implemented in the United States by the Commission in the so-called "DISCO II" proceeding. *In the Matter of Amendment of the commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Services in the United States,* Report and Order, 12 FCC Rcd 24094 (1997) ("*DISCO II Order*").

[149] *In the Matter of Hughes Communications Group, Inc. and Affiliated Companies and Anselmo Group Voting Trust/PanAmSat Licensee Corp. and Affiliated companies Application for Transfer of Control and/or Assignment of Various Space Station, Earth Station, and Section 214 Authorizations,* Order and Authorization, 12 FCC Rcd 7534 (1997).

[150] *In the Matter of Loral Space & Communication Ltd. and Orion Network Systems, Inc. et al. Application for the Transfer of Control of Various Space Station, Earth Stations, and Section 214 Authorizations,* Order and Authorization, 13 FCC Rcd 4592 (1998).

[151] *COMSAT Non-Dominance Order*, 13 FCC Rcd 14083.

[152] *Excel Communications, Inc.*, File No. ITC-T/C-19980717-00495, 13 FCC Rcd 17792 (1998).

[153] *In the Matter of Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025 (1998) ("*MCI/WorldCom Order*").